Supreme Court U
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No. 99-823

In The

Supreme Court of the United States

MARIO NIEMAN,

Petitioner,

v.

DRYCLEAN U.S.A. FRANCHISE COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TERRY W. SCHACKMANN
Counsel of Record
CLAYTON L. BARKER
WENDY E. DEBOER
SPENCER FANE BRITT & BROWNE LLP
1000 Walnut Street, Suite 1400
Kansas City, Missouri 64106-2140
Tel: (816) 474-8100
Fax: (816) 474-3216
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether petitioner, who challenged non-disclosures in Argentina as violations of the FTC Franchise Rule, now may challenge such conduct in this Court as unlawful under the FTC Act independently of the FTC Franchise Rule, when petitioner made no such showing or argument below.

2. Whether this Court should decide whether Florida law, which protects consumer transactions in Florida, creates a cause of action for Argentine residents who lack such rights under Argentine law, by extending Florida and FTC jurisdiction to commercial negotiations in Argentina with Argentine businessmen seeking rights to sell franchises in Argentina.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 Respondent states that it is a subsidiary of Dryclean U.S.A., Inc., which is a subsidiary of DCI USA, Inc., which in turn is a subsidiary of Delia's Cleaners Inc. Respondent has no non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

Petitioner Nieman here seeks to escape from the theory on which he prosecuted his action below, to gain the "opportunity" to present a claim, Petition at 5, that he already had the opportunity to litigate but abandoned below. Nieman resolved the case below on cross motions for summary judgment, arguing that respondent DUSA's[1] failure to provide in Argentina, the U.S. FTC Franchise Rule disclosures violated the FTC Act and the Florida Deceptive and Unfair Trade Practices Act ("DUTPA") as a matter of law. Petitioner Nieman here abandons that claim. Petition at 5. Petitioner here argues for the opportunity to create below a factual record that non-compliance with U.S. law in Argentina was, as a matter of fact, unfair or deceptive irrespective of the Franchise Rule, a claim petitioner never pursued below.

A. NATURE OF THE CASE

Petitioner Nieman brought this action below to recover the non-refundable $50,000 deposit that his sophisticated Argentine business group negotiated and paid, in Argentina, for exclusive rights to negotiate a master franchising agreement to sell franchises in Argentina. Nieman's group paid these funds to respondent DUSA for its forbearance from contracting with other applicants while Nieman's group sought financing for the master franchise arrangement. After DUSA performed its promise, Nieman sought to avoid his own obligation to

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[1] Dryclean U.S.A. Franchise Company, Inc.

DUSA. Deciding not to go forward with the master franchising arrangement, Nieman came to Florida to demand return of the deposit that he tendered in Argentina as the non-refundable inducement for DUSA to forego business opportunities.

Nieman and his group were sophisticated businessmen with franchising expertise. Petitioner Nieman had over twenty years experience in the international courier business and in U.S. business practices. His principal partner, Guillermo Mizraji, was an Argentine attorney, law professor, and business consultant knowledgeable in franchise law. Two other partners had extensive experience in DUSA's own line of business and in advertising.

Although Nieman here portrays the facts to the contrary, virtually all relevant conduct in the transaction at issue here occurred in Argentina. The Court of Appeals so found. Petition App. A at 5a n.4. Petitioner Nieman so admitted in the trial court, where this action was submitted on cross-motions for summary judgment on stipulated facts. The parties' negotiations for the option contract did not occur in Florida, but "took place in the form of personal contracts [sic] between [DUSA's] agent in Argentina and Plaintiff [Nieman], telephone conversations and tax correspondences between Buenos Aires, Argentina and Miami/Ft. Lauderdale, Florida." Joint Pretrial Stip. Statement of Case, ¶ E. Petitioner's negotiations were solely aimed at the operation and sale of franchises in Argentina. The question below was whether DUSA was obligated to deliver in Argentina the disclosure documents required in the U.S. by the FTC Franchise Rule, which regulates franchise sales in the U.S.

DUSA, a Florida corporation, sought a sub-franchisor to develop dry-cleaning franchises across Argentina. After DUSA advertised in Argentina, Nieman, an Argentine citizen and resident, approached DUSA in Argentina to negotiate a master franchise agreement. Nieman offered and paid U.S. $50,000 for exclusive negotiation rights for a stated period in which Nieman could evaluate business prospects. Nieman explicitly agreed in Argentina that this deposit was not refundable. The personal negotiations between DUSA representatives and Nieman occurred in Argentina. Nieman signed a letter of intent, which tendered the non-refundable deposit, in Argentina. He wired his funds from Argentina to DUSA in Florida.

The letter of intent at issue here created rights and obligations solely in Argentina. DUSA promised to forebear from further seeking master franchisors in Argentina in exchange for the non-refundable deposit. The letter of intent contained no choice-of-law provision, and the parties never executed any agreement that chose Florida law.

Petitioner Nieman makes no claim that DUSA failed in Argentina to abide by Argentine law. Petitioner claims instead that DUSA, while in Argentina, failed to provide Nieman's Argentine business group with franchise disclosure documents applicable to franchise sales in the U.S. under the FTC Franchise Rule. Nieman made no claim that any Argentine law required such disclosure. Neither does Nieman claim that DUSA ever refused him any information his group requested during negotiations. Nieman did not claim below, on the cross-motions for summary judgment, that DUSA's conduct misled him or was, as a matter of fact, deceptive. Indeed, Nieman argues that issues of his knowledge or reliance were

irrelevant under the FTC Franchise Rule, where liability was "strict."[2]

B. PROCEEDINGS BELOW

To recover his $50,000 payment, Nieman orginally filed a four-count petition in Florida state court alleging four federal and state statutory violations. DUSA removed the case to federal district court. 28 U.S.C. § 1441(a) (1994). The Court then dismissed all claims other than Count 3, which alleged that DUSA breached the DUTPA by failing to provide disclosures required under the FTC Franchise Rule, 16 C.F.R. § 436.1. Nieman argued in his motion that DUSA's "failure" was actionable under Florida's DUTPA, which creates a private cause of action for violations of the FTC Franchise Rule. Nieman never claimed below that the failure to tender

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[2] *See* Petitioner's Mem. of Law and Fact in Support of Plaintiff's Cross-Motion for S.J., at 14-15. Petitioner summarized his argument as follows: "Plaintiff has paid Defendant $50,000 . . . under circumstances where [ ] there was a *per se* ***violation of the FTC Regulations*** regarding the Defendant franchisor taking money from Plaintiff prior to providing disclosures as required under 16 C.F.R. § 436.1. Accordingly, Plaintiff is entitled to a refund of the $50,000 as 'actual damages' sustained by Defendant's violation of the Little FTC Act, Fla. Stat. § 501.201 *et seq.*, which incorporates as actionable the ***violation of the FTC Regulation*** requiring delivery of the UFOC to the franchisee prior to taking any funds from franchisee." *Id.* at 4. Petitioner's argument heading read: "Under Florida Law, Plaintiff Is Among The Class Protected By The Unfair and Deceptive Trade Practices Act (Fla. Stat. § 501.201 *et seq.*, As Amended In 1993), Which Defines As Deceptive Those Acts Which ***Breach FTC Promulgated Regulation***." *Id.*

franchise documents violated the FTC Act independently of the Franchise Rule.

The parties submitted the case on cross-motions for summary judgment. DUSA concededly did not tender the franchise disclosure documents required under the Franchise Rule. Petition at 3a. DUSA, like most international investors, believed that the Rule did not address foreign sales of franchises in foreign countries under foreign management. To the contrary, Nieman argued that violation of the Franchise Rule was, without more, a DUTPA violation. Nieman did not raise any theory below by which DUSA's inaction might be found unlawful under DUTPA other than as a violation of the Franchise Rule, which Nieman now concedes does not apply.

The district court granted Nieman's motion for summary judgment. In a single sentence, the court declared that the FTC Act and the Franchise Rule applied extraterritorially. The court relied on one case holding the FTC had the ***power*** to pursue U.S. companies engaging in foreign commerce whose fraudulent domestic activities created adverse effects on their U.S. competition. The court made no findings, and had no evidence before it, of such facts here. DUSA timely appealed.

The Court of Appeals for the Eleventh Circuit reversed the trial Court's decision and held that the Franchise Rule does not apply extraterritorially. The Court found that the FTC Act, in its unfair and deceptive practices jurisdiction, does not contain the necessary express language to overcome the presumption against extraterritorial application. The Court likewise found that the FTC did not promulgate the Franchise Rule to protect

franchisees in foreign countries. Petitioner does not challenge this latter finding. Instead, Nieman argues here, for the first time, that DUSA's failure to provide unsolicited information in the form of domestic Franchise Rule disclosures to a franchisee in Argentina is deceptive, as a matter of fact, and violates the FTC Act independently of the Rule. Nieman so argues to create a claim here under the Florida DUTPA, an issue of state law.

REASONS FOR DENYING THE WRIT

This Court generally does not address an issue unless it is potentially outcome determinative. *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1970) ("This Court- . . . reviews judgments, not statements in opinions"). Neither does this Court address issues not raised or considered below. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 147, n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them"); *Lawn v. United States*, 355 U.S. 339, 362-363 n.16 (1958); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981). "Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). These general rules have particular potency here. Petitioner neither raised his primary argument below nor developed the record to support the new argument. Petitioner in effect asks this Court to construe state law, the Florida DUTPA, which by its own terms faces additional limitations that render it inapplicable here.

I. NIEMAN'S PETITION RAISES ISSUES AND FACTS NOT PRESENTED BELOW

This Court should not grant certiorari in this case because the primary question presented for review was not raised below and the factual record does not support it. Nieman asks this Court to decide whether the FTC Act and the Florida DUTPA apply extraterritorially independently of the FTC Franchise Rule. Nieman below argued only that DUSA violated the FTC Franchise Rule; he neither argued nor made a factual record of deceptive conduct violating the FTC Act independently of the Rule. In his petition, however, Nieman now concedes that the Eleventh Circuit correctly held that the Franchise Rule does not apply extraterritorially. Nieman pursued below, however, no other grounds for violation of the FTC Act or DUTPA. Unless this Court decides to part from its normal practice and address a new issue here, there is no issue before the Court that could support a reversal of the judgment.

Under the Franchise Rule, franchisors are required to supply franchisees with designated information about their franchise. The substance of these disclosures reveals a purely domestic, rather than extraterritorial application. The Eleventh Circuit correctly held that the Franchise Rule does not cover foreign sales of franchises to be located outside of the United States, and the DUSA's actions were lawful. *Nieman v. Dryclean U.S.A.*, 178 F.3d 1126 (11th Cir. 1999). Nieman's new argument rests on the proposition that failure to make these disclosures to a franchisee outside of the United States violates the FTC

Act irrespective of the Franchise Rule. This new argument should not be considered by the Court.

Even if this question warranted a special exception to the rule against raising issues for the first time before this Court, there is no factual record to support the adjudication of this question here. To support such a claim, Nieman must show that DUSA participated in "unfair or deceptive acts or practices." 15 U.S.C. § 45(a)(1) (1994). He now claims that the failure to provide Franchise Rule disclosures in a transaction not covered by the Franchise Rule is itself unfair. There is no factual record to allege that DUSA's conduct was either unfair or deceptive. The factual record indicates that Nieman is an experienced businessman and part of a large group of investors who, in an arms length transaction, sought to obtain franchising rights for an entire country. There is no indication Nieman ever asked for the information that DUSA failed to provide. Because Nieman did not raise the issue on this claim for review below, Nieman's petition should be denied.

II. QUESTIONS OF STATE LAW DEFEAT PETITIONER'S CLAIM UNDER THE FLORIDA STATUTE HERE

At its core, Nieman's petition requires the interpretation of Florida law. This Court does not generally decide issues of state law, but instead defers to the decisions of district courts and courts of appeals on state law. *Sheridan v. United States*, 487 U.S. 392, 402 n.6 (1985) (remanding to district court issue whether particular facts constitute a cause of action under Maryland law). *See also Cort v. Ash*,

422 U.S. 66, 72 n.6 (1975); *C.I.R. v. Real Estate of Bosch*, 387 U.S. 456, 462 (1967).

Because Nieman cannot bring a private cause of action under the FTC Act, he brings his claim under the Florida DUTPA. Two issues of state law arise from this entanglement of Federal and Florida law. The first is whether DUSA's actions were unlawful under DUTPA, regardless of whether they may violate the FTC Act. The second is whether Nieman has standing under DUTPA to bring this claim. Neither the district court nor the court of appeals decided these issues.

The interpretation of the Florida statute is an issue properly left to the lower courts. DUTPA declares "unfair or deceptive acts or practices" unlawful and declares that "due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1)." Fla. Stat. § 501.204(2) (1993). Federal interpretations of the FTC Act's "unfair and deceptive acts or practices" language, however, may not be identical to Florida's interpretation of the similar language in DUTPA. Adjudicating the question of whether DUSA's actions were unlawful under the FTC Act will not conclusively answer the question of whether they were unlawful under DUTPA.

Florida law also controls the question of whether Nieman is within the protection provided by DUTPA. DUTPA protects only consumers. *See* Fla. Stat. § 501.203(7) (1993). The Florida Court of Appeals recently

held that DUTPA did not include a manufacturer within its protections. *Warren Technology, Inc. v. Hines Interests Limited Partnership*, 733 So. 2d 1146 (Fla. App. Dist. 1999). In *Warren*, the Florida Court indicated that DUTPA does not protect individuals or groups of individuals acting as producers or manufacturers. Nieman's investment group intended to sell individual franchises to smaller franchisees. Whether this investment group is a consumer under Florida law is a question best determined by a lower court.

III. THE COURT OF APPEALS DECIDED THE ISSUE CORRECTLY AND THERE IS NO SPLIT IN THE CIRCUITS

The Eleventh Circuit correctly determined that the FTC Act and the Franchise Rule do not apply extraterritorially. It is a long-standing principle that, unless a contrary intent expressly appears, statutes and regulations apply only within the territorial jurisdiction of the United States. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991); *see also Smith v. United States*, 507 U.S. 197, 204 (1993); *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949); *Blackmer v. United States*, 284 U.S. 421, 437 (1932); *Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1425 n.12 (11th Cir. 1995). To overcome this presumption, the petitioner must show that Congress expressly intended application of a particular law outside U.S. borders. Statutory language, legislative history, or administrative interpretations must express a clear intent that a rule apply within the borders of a foreign country. *Arabian American Oil Co.*, 499 U.S. 244; *see also Foley Bros.*, 336 U.S. at 285-88; *McCulloch v. Sociedad Nacional de Marineros de Honduras*,

372 U.S. 10, 19 (1963). Even statutes that expressly reach parties in "***foreign*** commerce" do not necessarily apply to conduct within the borders of a foreign country. *Arabian American Oil Co.*, at 251 (emphasis in original).

Reference to "foreign" commerce within the "commerce" addressed by the FTC Act does not create extraterritoriality. "We have repeatedly held that even statutes that contain broad language in their definitions of 'commerce' that expressly refer to '*foreign* commerce' do not apply abroad." *Arabian American Oil Co.*, 499 U.S. at 251 (emphasis in original). Extraterritorial intent cannot be "deduced by inference from boilerplate language which can be found in any number of congressional Acts none of which have ever been held to apply overseas." *Id.* (citing statutes). Plausible explanations of boilerplate language do not overcome the presumption against extraterritorial application. *Id.* at 250.

This Court has held that jurisdictional language similar to that of the FTC Act does not permit extraterritorial application. The Court in *New York Central R.R. v. Chisholm*, 268 U.S. 29 (1925), held the phrase "engaging in commerce between any of the several states . . . and any foreign nation or nations," is insufficient for extraterritorial application. *Chisholm* noted that the Federal Employer's Liability Act, 45 U.S.C. § 51 ("FELA") "contains no words which definitely disclose an intention to give it extraterritorial effect." *Chisholm*, 268 U.S. at 31. *Chisholm* held that FELA did not create rights or liabilities when a U.S. interstate carrier – in "foreign commerce" – killed a U.S. employee in an accident in Canada. The *Arabian American Oil Co.* Court approved this analysis.

The Court in *Arabian American Oil Co.*, 499 U.S. at 251-52, cited *McCulloch* as an example of the presumption against foreign application of U.S. law. In *McCulloch*, 372 U.S. 10, the Court held that defining "commerce" as "any trade, traffic, commerce, transportation or communication . . . between any foreign country and any State," 29 U.S.C. § 152(6), did not manifest an intent for extraterritorial application. *Id.* at 551 n.3, 555. "Even though the NLRA contained broad language that referred by its terms to foreign commerce, § 152(6), this Court refused to find a congressional intent to apply the statute abroad because there was not any 'specific language' in the Act reflecting congressional intent to do so." *Arabian American Oil Co.*, 499 U.S. at 251-52. *See also Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 146-47 (1957).

Petitioner's reliance on general jurisdictional language to support extraterritoriality pursues a flawed theory. References to foreign commerce in boilerplate jurisdictional statements identify the parties to whom the law applies, not the location of those parties' acts to which the law applies. The language establishes federal jurisdiction over U.S. parties engaged in foreign commerce; without more, the language does not establish that jurisdiction extends to those acts of those parties that occur in a foreign land, as in *Chisholm*, *Arabian American Oil Co.* and *McCulloch*. The FTC Act creates FTC jurisdiction over a U.S. business in foreign trade, whose fraudulent actions inside the United States harm U.S. competitors. *See Branch v. FTC*, 141 F.2d 31 (7th Cir. 1944). It does not extend jurisdiction over a U.S. company whose acts in a foreign country may harm citizens of that foreign country.

Neither do these boilerplate jurisdictional statements extend jurisdiction over acts committed in a foreign land, even if harming U.S. citizens there. In *Chisholm*, for example, the Court refused to equate jurisdiction "over foreign commerce" with the extension of FELA jurisdiction to an accident, outside the United States, in which a U.S. company killed its U.S. employee. In *McCulloch*, the Court ruled U.S. law did not apply aboard a foreign flagged ship – in essence, on foreign territory – in a U.S. port, even though the law reached activities "in foreign commerce." In *Arabian American Oil Co.*, the Court ruled the same for a U.S. company's discrimination against a U.S. employee abroad. No basis exists to believe that FTC "unfair or deceptive practice" jurisdiction, distinct from its antitrust jurisdiction, is any different.

Congress is capable of expressing an affirmative extraterritorial intent when it so desires. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989). Indeed, Congress has explicitly extended the antitrust jurisdiction extraterritorially. 15 U.S.C. § 45(a)(3) (1994). The FTC unfair and deceptive trade practice jurisdiction, in contrast, has no such express intent, *see* 15 U.S.C. § 45(a), and neither the agency nor the Department of Justice ever has indicated that the statute so applies. Petitioner reads this explicit grant of extraterritorial authority as a limitation on a broader, implicit extraterritoriality "deduced by inference," *Arabian American Oil Co.*, 499 U.S. 251, from presumed intent. Petitioner stands this Court's decision in *Arabian American Oil Co.*, on its head. Extraterritorially is neither presumed nor "deduced by inference." *Id.*

There is no conflict in the Courts of Appeals over the extraterritorial application of the FTC Act. Nieman relies exclusively upon the Seventh Circuit's 1944 decision in *Branch* to show disagreement among the circuits on this issue. Petitioner's reliance on dicta from the Eleventh Circuit's opinion below to illustrate this conflict is unfounded. *Branch* does not conflict with the Eleventh Circuit's opinion below. Nieman argues that *Branch* identifies an express intent for extraterritorial applicability of the FTC Act. *Branch* does not. *Branch* did not apply the FTC Act extraterritorially. The Court below distinguished *Branch* from the case at bar and noted that the *Branch* decision predicated jurisdiction on the effect of fraudulent ***domestic*** activities on ***domestic*** competition. *Id.* at 35. Indeed, the *Branch* Court specifically stated it was ***not*** applying the FTC Act extraterritorially, and that extraterritorial effects were irrelevant to its decision. *Id.* No conflict exists. Indeed, petitioner cites to no other case in the last 55 years to support the notion that lower federal courts lack clear judgment in this area of the law.

CONCLUSION

For the foregoing reasons, this Court should deny Nieman's petition.

Respectfully submitted,

SPENCER FANE BRITT & BROWNE LLP
TERRY W. SCHACKMANN
Counsel of Record
CLAYTON L. BARKER
WENDY E. DEBOER
1000 Walnut Street, Suite 1400
Kansas City, Missouri 64106
Telephone: (816) 474-8100
Facsimile: (816) 474-3216

Attorneys for Respondent